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SUBROGATION AND LIMITATION*

Subrogation is defined in *Wilkins* v. *Gibson* (1) by Justice Cobb as "arising in cases where the party claiming the right advanced money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." So defined, subrogation is either legal or conventional. Legal subrogation into the rights of a creditor takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for a purchaser who extinguishes the encumbrances upon the estate, or of a co-obligor or surety who discharges the debt or of an heir who pays the debts of succession [*Shin* v. *Budd* (2)]. In India, the only cases of legal subrogation are provided for by Ss. 74 and 95 of the Transfer of Property Act and the rest of the cases have to be decided under general principles of law. Conventional subrogation, on the other hand, arises under an express agreement that the person paying the debt would be subrogated to the rights and remedies of the original creditor. The nature and incidents of legal and conventional subrogation have been well discussed by Mukerji, J., in *Gurdeo Singh* v. *Chandrikah Singh* (3).

In the case of a mortgage, subrogation or substitution by operation of law to the rights and interest of the mortgagee is by redemption and the question of legal subrogation is studied with reference to S. 91 of the Transfer of Property Act where the list of persons interested in the equity of redemption is given.

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*A paper read under the auspices of the Bar Association, Cocanada, by Mr. K. Raghavacharyulu, M. A., B. L.

1. (1901) 113 Georgia 31 : 38 S E 374. 2. (1862) 14 N J Eq. 234.
3. (1907) I L R 36 C 193.

The right to redeem and the consequential rights are thus mainly statutory. Many interesting and complex problems arise for consideration in a discussion of the law of subrogation, viz., (1) who are entitled to the right of subrogation; (2) whether the right can be enforced in the same proceedings or whether a separate suit has to be filed; (3) whether partial subrogation can be allowed; (4) whether the subrogee is entitled to an assignment of the mortgage rights; (5) the amount that can be claimed by subrogation; and (6) the question of limitation within which the right could be enforced. Each of these questions is so very complex that the High Courts have not only differed from each other in the consideration thereof but different benches of the same High Court have after a good deal of deliberation thought fit to pronounce diametrically opposite judgments under similar circumstances. The right of a puisne mortgagee to redeem has been considered only to be a right ancillary to that of working out his remedy against the mortgaged estate by foreclosure. It must be considered only a means of "securing the object of enforcing his own claim by sale." This view had a far-reaching effect as regards the time within which he could redeem the prior mortgagee. The decision in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (4) followed in later cases by Krishnan, J., in *Appayya* v. *Venkataramayya* (5) and Madhavan Nair, J., in *Lakshmanan Chettiar* v. *Sellamuthu Naicker* (6) has laid down that a subsequent mortgagee coming to redeem after 12 years from the due date of his own mortgage was barred. The right of subrogation with reference to a third party who took a mortgage to pay off a prior mortgage debt has not been uniformly decided and his right to use the latter security for his own benefit has been denied in *Kandaswami* v. *Venkata* (7) by Spencer and Ramesam, JJ., but allowed by Devadoss, J., in *Avudai Ammal* v. *Chinna Ramaswami Naick* (8) following the English case of *Butler* v. *Rice* (9). The Calcutta High Court in the recent case of *Gobinda Chandra Basak* v. *Parasram* (10) (Greaves and Cuming, JJ.) allowed subrogation following the English cases of *Butler* v. *Rice* (9) and *Chetwynd* v. *Allen* (11).

4. (1909) 14 C W N 439. 5. (1924) 20 L W 620.
6. (1924) 47 M L J 602. 7. (1925) 22 L W 238 : A I R 1925 M 1219.
8. A I R 1925 M 129. 9. (1910) 2 Ch. 277.
10. A I R 1926 C 231 : 89 I C 116. 11. (1899) 1 Ch. 353.

The question of limitation in suits relating to subrogation has to be studied with reference to subrogation considered as a right enforceable by way of suit and subrogation used as a shield in defence. The first is the subject-matter of case-law under Ss. 74 and 95 of the Transfer of Property Act and the second has reference to the doctrine of keeping alive under S. 101.

The case of subrogation enforceable as a right and the question of limitation thereto seems to have been at first sight fairly concluded by the Privy Council case *Mahomed Ibrahim* v. *Ambika Prasad* (12). Such a right arises, as has been already noticed, in the case of a puisne mortgagee (S. 74), a co-mortgagor (S. 95), a surety, a purchaser of the mortgaged premises though the purchase might afterwards be set aside, tenants for life and lessees. The statutory charge given to a co-mortgagor has been extended in a number of cases by analogy to persons who under S. 82 of the Transfer of Property Act file suits for contribution, *Dhakeshwar Prasad Singh* v. *Harihar Prasad* (13), *Kashi Ram* v. *Het Singh* (14), *Sri Maharaja Parbhu Narain Singh* v. *Babu Beni Singh* (15) and *Har Prasad* v. *Raghunandan Prasad* (16). The Indian High Courts have uniformly given a charge in cases arising under S. 82, T. P. Act. Ghose in his Law of Mortgages thinks that the plaintiff in such cases occupies the position of an assignee of the original security the character of which is not altered when the debt is discharged. But he doubts whether the extension of a charge analogous to that under S. 95 is a legitimate process (pages 396 and 397, 5th Edition).

S. 74, T. P. Act, enunciates the rule that "the subsequent mortgagee shall acquire in respect of the property all the rights and powers of the mortgagee as such, to whom he has made the tender". S. 95, T. P. Act, says that "a co-mortgagor who redeems the mortgaged property and obtains possession thereof has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." In the first place, S. 95 uses the word "charge" in reference to a co-mortgagor who redeems the mortgaged property. Secondly, the clause "who redeems the mortgaged property and obtains possession"

12. (1912) I L R 39 C 527 (P C). 13. (1914) 21 C L J 104.
14. (1914) I L R 37 A 101. 15. (1909) 14 C W N 361.
16. (1908) I L R 31 A 166.

has occasioned a good deal of trouble in the interpretation thereof. Ghose in his Law of Mortgages (p. 372) and Chatterji, J., in *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (17) refer to the section as unskilfully drawn up and clumsily worded. The conflict as to whether the section should be limited to cases of usufructuary mortgage was at last set at rest by the Privy Council case *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (18) where it was held that "the section should be construed distributively to make the condition of obtaining possession apply only to cases in which the fulfilment is from the nature of the mortgage possible and in other cases to make the charge follow upon redemption." The conflict as to what is meant by a charge, whether the co-mortgagor would be entitled to the rights of the mortgagee as such as under S.74, T. P. Act, is as yet not finally settled. It is necessary to discuss this question with reference to the converse case of redemption by a co-mortgagor.

As regards subrogation enforceable as a right in the case of a co-mortgagor, the Courts have in spite of the use of the word 'charge' in S. 95 held that there is no difference in principle between the cases of a subsequent mortgagee, a purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage and that the same principles of equity and justice apply [vide *Raj Kamini Debi* v. *Mukanda Lal* (17) per Chatterji, J.]

We have next to consider the question of limitation to enforce the right of subrogation in suits by a puisne mortgagee, auction purchaser, etc. The questions that arise in this connection are (*i*) whether the subrogee in such cases is an assignee of the mortgagee's rights, (*ii*) what is the starting point of limitation, and (*iii*) the time-limit within which it should be enforced. The Privy Council in *Mahomed Ibrahim* v. *Ambika Prasad* (12) held that the plaintiff who paid the 1st mortgagee (It may be noted that the mortgage in this case did not ripen into a decree) must come within 12 years of the date when the 1st mortgage is payable and that consequently plaintiff's right of subrogation was barred under Art. 132, Limitation Act. This case has been distinguished in a number of cases [refer *Shib Lal* v. *Munni Lal* (19),

12. (1912) I L R 39 C 527 (P C). 17. (1920) 57 I C 868.
18. (1905) L R 32 I A 81 : 16 M L J 269 : I L R 28 A 482 (P C).
19. (1921) I L R 44 A 67.

Parvati Ammal v. *Venkatarama Aiyar* (20), *Suryabhan* v. *Renuka* (21) and *Narayan* v. *Nathmal* (22).]

The essence of the law of subrogation is that the party paying off a charge becomes in equity an assignee of the charge. The Patna High Court in *Sibanand Misra* v. *Jagmohan Lal* (23) has pointed out that the so-called subrogee has two rights, viz., (*i*) The right of reimbursement which arises on the date of payment and has to be discussed with reference to Ss.69 and 70, Indian Contract Act, and (2) the right of subrogation. Subrogation does not give him a fresh charge. The charge is already there and has to be enforced within the time prescribed (Das, J.).

In *Shib Lal* v. *Munni Lal* (19), the rights of the subrogee are held to be akin to an assignee's rights but there is no assignment express or implied. The rights of the subrogee could not accrue even before he paid any amount at all. The subrogee acquires a charge not on the date when the prior mortgage was made nor when that mortgage could be enforced but on the date when he pays off the amount due to the prior mortgage.

The judgment of Wallace, J. in *Parvati Ammal* v. *Venkatarama Aiyar* (20) strikes a *via media* between the interpretations above noticed. The subrogee is there held to be an equitable assignee of the charge entitled by a legal fiction to the charge as it stood on the date of the assignment. "It is difficult to see how an assignment can have the effect of so to speak setting back the hands of the clock of evolution and reviving a form out of which the charge has already developed so that the charge assigned is not the charge as on the date of assignment but some previous and outworn state thereof . . . The proper doctrine is that the subrogee steps into the shoes of the prior mortgagee at the point where he is standing and takes over whatever rights and remedies he possesses at the moment when the lien on the property is paid off. An assignee in equity cannot take something less than the rights of his assignor, since in the hands of the assignor the mortgage charge has taken a new lease of life through the decree while in the hands of the assignee it may be already dead. In *Mahomed Ibrahim* v. *Ambika Prasad* (12) the mortgage charge

12. (1912) I L R 39 C 527 (P C).
19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316.
21. (1925) 92 I C 118.
22. (1921) 65 I C 275.
23. (1922) 68 I C 707.

had not ripened into a decree and it is hardly in point." The learned Judge did not consider the question of limitation in this case but he observes that the charge so acquired should be enforced by a separate suit. In this judgment it would seem to be the opinion of Wallace, J., that the subrogee can enforce his right within 12 years of the date of the decree—the right being the right to bring the property to sale to discharge the decree debt. The learned Judge in the later case *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) explains his view and observes that he meant only three years from the date of the decree.

In *Nathuram* v. *Sheolal* (25) the Court held that the period of limitation is 12 years from the date of the prior mortgage or the date on which it can be enforced.

In the later case *Narayan* v. *Nathmal* (22) the subrogee was held to acquire the rights under the decree and not the rights under the original mortgage. In *Narayan* v. *Syed Hafiz* (26) the starting point was held to be the date when the prior mortgage fell due.

The question was referred to a Bench in *Suryabhan* v. *Renuka* (21) and the Court following *Shib Lal* v. *Munni Lal* (19) and approving the observations in *Parvati Ammal* v. *Venkatarama Aiyar* (20) held that the puisne mortgagee acquired rights under the decree. "Before the time comes for payment a claim on the basis of the mortgage might be time barred. The result would be that where the condition in the prior mortgage is one of foreclosure, the puisne mortgagee would have to pay the prior mortgage debt without being able to recover it from the mortgagor or be foreclosed and lose the amount advanced to the mortgagor. Art. 132 would apply, 12 years being counted from the date when the money became due. The money can be said to have become due to plaintiff and the right to foreclose in default of payment to have arisen in his favour only when he made the payment and became entitled under S. 74 to the rights under the decree. The Privy Council case does not apply as new rights were created under the decree."

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19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316.
21. (1925) 92 I C 118.
22. (1921) 65 I C 275.
24. (1926) 52 M L J 532.
25. (1917) 42 I C 796.
26. (1923) 87 I C 264.

In *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) (Wallace and Madhavan Nair, JJ.) the Court held that the fact that a decree on the basis of the prior mortgage was obtained when the payment was made by the subsequent mortgagee did not make any difference in principle. The period of limitation is the same as that for a suit on the prior mortgage itself. *Mahomed Ibrahim* v. *Ambika Prasad* (12) was followed, *Parvati Ammal* v. *Venkatarama Aiyar* (20) explained and *Shib Lal* v. *Munni Lal* (19) was dissented from.

I have so far reviewed the case-law bearing upon the question of subrogation claimable as a right. I proceed to discuss the various observations in the above suits and point out that the doctrine enunciated in *Mahomed Ibrahim* v. *Ambika Prasad* (12) is highly anomalous and inequitable. It may be noted at the outset that the English law of subrogation does not point out any distinction in principle in cases arising under the head of legal subrogation whether it is the case of a puisne mortgagee, a co-mortgagor, an auction purchaser, or a surety. They are all treated as having been legally substituted in the place of the prior mortgagee. The English Law treats them as assignees in equity and the Indian Law, except for certain judgments of the Allahabad and Nagpur Courts which hold that their rights are akin to those of an assignee, treats them as assignees of the prior mortgagee's rights. Whether we consider them as assignees in equity or representatives of the prior mortgagee, we are confronted with a situation where their rights as assignees or representatives are denied to them. (1) The subrogee is denied the right of continuing the proceedings from the state at which the prior mortgagee has left them. We are concluded on this point by the Privy Council decision in *Gopi Narain* v. *Bansidhar* (27) and the Madras cases *Sundara Reddiar* v. *Subbiah Koundan* (28), *Parvati Ammal* v. *Venkatarama Aiyar* (20) and *Avudai Ammal* v. *Chinna Ramaswami Naick* (29). The *ratio decidendi* in those cases was that the decree obtained by the prior mortgagee being satisfied, no one can execute a satisfied decree. In spite of the observations of the Privy Council, the puisne mortgagee who was a party to the prior mortgagee's suit was al-

12. (1912) I L R 39 C 527 (P C).
19. (1921) I L R 44 A 67.
20. (1924) 47 M L J 316.
24. (1926) 52 M L J 532.
27. (1905) I L R 27 A 325.
28. (1912) 24 M L J 28.
29. A I R 1925 M 129.

lowed to continue the same proceedings in *Shanker Rao* v. *Ganpat Rao* (30) and *Loola* v. *Pyare* (31).

(2) The subrogee who is deemed to be an assignee for all practical purposes is again held to be an assignee of the rights under the prior mortgage and not of the rights under the decree. This view is obviously wrong. Whether as an assignee or as a representative, the subrogee is entitled to the rights of the prior mortgagee as on the date of payment. In cases where the prior mortgage rights ripened into those under the decree, it is contrary to all principles of justice and equity to hold that the subrogee gets the rights under the mortgage and not those under the decree. This 'sets back the hands of the clock of evolution' in the words of Wallace, J. Whereas in the hands of the prior mortgagee, the rights under the decree are kept alive the subrogee in respect of the prior mortgage may find them barred. This aspect could not be considered in the Privy Council case as the prior mortgage therein had been discharged before it reached the stage of a decree.

(3) The third reason why the law of subrogation allowing the subrogee only the rights under the mortgage is anomalous is this. Suppose the prior mortgagee filed a suit on the last day of limitation impleading the puisne mortgagee and brought the properties to sale. The puisne mortgagee or the auction purchaser whose sale happens to be set aside have to lose their remedy against the mortgagor or his representatives-in-interest. They get merely the rights allowed to them by law under Ss. 69 and 70 of the Contract Act. The charge they are supposed to have acquired by the operation of law and the application of the doctrine of subrogation is evidently unenforceable as being barred. A puisne mortgagee must thus perforce lose the amount he pays to the prior mortgagee or allow himself to be foreclosed under the prior mortgagee's decree.

(4) Where a co-sharer pays the entire revenue payable upon an estate and brings a suit for contribution the Madras High Court in *Raja of Vizianagram* v. *Rajah Setrucherla Somasekhararaju* (32) held that the co-sharer was entitled to a charge upon the shares of his other co-sharers but the charge was based on the equitable doctrine and not on

30. (1924) 80 I C 283. 31. (1915) 33 I C 496.
32. (1903) I L R 26 M 686 : 13 M L J 83 (F B).

the law of subrogation. They observed that the charge was originally in favour of the Crown only and the person who made the payment could not get it by operation of law express or implied. The scope of Ss. 82, 95 and 100 of the Transfer of Property Act, the English, American, and Irish Cases were discussed and the Full Bench decisions of the Calcutta and Allahabad High Courts were dissented from. (Refer to pages 697-712 of the learned judgment of Justice Bhashyam Aiyangar approved by the Full Bench.) The Full Bench held that such a co-sharer is entitled in equity to a charge upon the shares of the other co-sharers for the excess amount paid by him. As a matter of law he was not so entitled as S. 35 of the Revenue Recovery Act did not provide a charge in his case. That section only referred to a *bona fide* mortgagee or other encumbrancer or any person not being in possession of the estate but *bona fide* claiming an interest therein adverse to the defaulter.

I have discussed at length the scope of the decision in *Raja of Visianagram* v. *Rajah Setrucherla Somasekhararaju* (32) followed in the later cases of *Alayakammal* v. *Subbaroya Goundan* (33) and *Puthempurayal Amman Pariyayi* v. *Pakran Haji* (34) to point out the anomaly that a co-sharer who paid some money charged upon immoveable property and has *no legally enforceable charge* is *by the invocation of the doctrine of equity* given a charge within the meaning of Art. 132 of the Limitation Act capable of being enforced *within* 12 *years from the date of payment*, while in the case of a person who paid the amount due under a mortgage and *who is entitled in law to have a charge upon the property for the amount so paid*, is denied the right of enforcing it within 12 years of the date of payment.

Ghose in his Law of Mortgages at page 397 with reference to suits for contribution under S. 82 of the Transfer of Property Act says that there is a singular divergence of opinion in America with respect to the question of limitation, that the better opinion prevailing is that a person bound only to pay a portion of the mortgage debt acquires on redemption the same rights as the mortgagee, and that the period of limitation will not be either longer or shorter. It is hard to under-

32. (1903) I L R 26 M 686 : 13 M L J 83 (F B).
33. (1905) I L R 28 M 493 : 15 M L J 219.
34. (1912) 24 M L J 548.

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stand why the learned author calls it the better opinion in view of the fact that subrogation itself is an equitable right and that the charge given by such a doctrine is rendered nugatory by the application of the law of limitation in many cases. The doctrine of subrogation, legal or conventional, was intended not only to safeguard the rights of persons who redeem a prior mortgagee but also to allow them a priority against subsequent encumbrancers and it is really deplorable that what is given with the right hand is snatched away by the left under the guise of limitation.

In this anomalous state of things, it is necessary that the legislature should interfere to protect the rights of auction-purchasers, puisne mortgagees and others interested in redeeming a prior mortgage. It would not be too much to suggest that Ss. 74, 82 and 95 may be consolidated as the principle underlying each of these sections is the same, thereby avoiding a discussion as to the difference in the wording of the different sections and thus giving all the persons interested in redemption the right of subrogation and priority which they are entitled to in equity. I would also suggest a new article to be introduced into the Limitation Act providing 12 years as the period of limitation from the date of payment in suits relating to subrogation. It would thus in equity be the best possible solution of all the complicated problems relating to the law of subrogation, as giving complete protection to the interests of innocent puisne encumbrancers and auction-purchasers.

Now coming to the question of subrogation held up as a shield in defence, it may be noted that the doctrine of Merger enunciated in *Toulmin* v. *Steere* (35) was held not to be applicable to India in the Privy Council case of *Gokaldoss* v. *Puranmal* (36) and even in England in the later cases of *Thorne* v. *Cann* (37) and *Liquidation Estates Purchase Co.* v. *Willoughby* (38) the doctrine has been doubted. S. 101, Transfer of Property Act, has made it clear that the prior mortgage can be kept alive where the intention is either express or implied and in all cases the presumption of keeping alive is drawn where it is for the benefit of the person claiming it.

There cannot be any limitation where the prior mortgage is kept alive as a shield. In fact all the cases with reference

35. (1817) 3 Mer. 210. 36. (1884) L R 11 I A 126 : I L R 10 C 1035 (P C)
37. (1895) A C 11 38. (1898) A C 321.

to this aspect of the question have been decided without any reference to the question of limitation. The Privy Council in *Het Ram* v. *Shadi Ram* (39) decided under S. 89 of the Transfer of Property Act that the decree in favour of the defendant prior mortgagee could not be held up as a shield as the decree was not executed and was barred by limitation, and the mortgage could not be set up as a shield as it contravened the provisions of S. 89, Transfer of Property Act. As the decree-holder slept without taking any steps under the decree and without bringing the property to sale, the Privy Council thought fit in equity to deny the right of keeping alive to such a mortgagee. In the later Privy Council cases *Musummat Sukhi* v. *Gulam Safdar Khan* (40), *Lala Matru Mal* v. *Durga Kunwar* (41) and in the Madras cases *Avathoraman Kutti* v. *Ittikaparambil Uthan* (42), *Chidambara Nadan* v. *Muni Nagendrayyan* (43) and *Suppan Sokkayya Bhattar* v. *Suppu Bhattar* (44) the prior mortgage was kept alive even beyond the period of limitation. In *Venkataramana Reddi* v. *Rangiah Chetti* (45) the question of limitation was raised and Sadasiva Aiyar, J., after carefully examining all the decisions bearing upon the question, held that the purchaser in execution of the 1st mortgage decree was entitled to set up the amount paid as a shield, irrespective of the question of limitation. The learned Judge quoted the words of Richards, C. J., in *Chhagan Lal* v. *Muhammad Husain Khan* (46). The very metaphor of the shield indicates the distinction. A man does not attack with the shield but defends with it. In *Sambhu bin Hanmanta* v. *Nama bin Narayan* (47) Chandavarkar, J., strikes a dissentient note. The learned Judge held that the lien of a person who paid the first mortgage came into existence on the date of payment and that the lien could not be set up as a shield by the defendant if 12 years had elapsed after the date of payment. It may be noted, however, that the observation of the learned Judge was *obiter*, the case being decided against the plaintiff on the ground that the defendant acquired rights by adverse possession having entered into possession in pursuance of an unregistered sale deed after discharging a prior mortgage on the property.

39. (1918) 35 M L J 1 (P C). 40. (1921) M W N 445 (P C).
41. (1920) M W N 338 (P C) 42. (1920) M W N 143.
43. (1920) M W N 534. 44. (1918) M W N 41.
45. (1920) M W N 15. 46. (1919) I L R 41 A 456 (F B).
47. (1911) I L R 35 B 438.

The law seems to be uniform except for the *obiter dictum* of Chandavarkar, J., in *Sambhu bin Hanmanta* v. *Nama bin Narayan* (47). But we are confronted with a recent decision of Madhavan Nair and Wallace, JJ., in *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) where a second mortgagee who had discharged a prior mortgage was held not entitled in a suit for redemption by a mortgagor to keep alive the first mortgage on the ground that his right to enforce the prior mortgage was barred as the suit was brought 12 years after the date when the prior mortgage became enforceable. This view is entirely unsound in view of the general law of subrogation relied upon as a shield in defence and in the light of the learned remarks of Sadasiva Aiyar, J., in *Pingali Venkataramana Reddi* v. *Kotigari Rangiah Chetti* (48) and in fact the Privy Council in *Lala Matru Mal* v. *Durga Kunwar* (41), the Madras High Court in *Avathoraman Kutti* v. *Ittikaparambil Uthan* (42) (Seshagiri Aiyar and Moore, JJ.), *Suppan Sokkayya Bhattar* v. *Suppu Bhattar* (44) (Wallis, C. J. and Ayling, J.) and other cases allowed the doctrine of 'Keeping alive' to be applied in cases where the 1st mortgage was clearly barred. A question of limitation properly arises in the case of a plaintiff who tries to enforce a right against the defendant and it is opposed to principles of justice and good conscience to hold that it applies to the rights claimed by the defendant in defence. The only exception to the rule is in the case of set off (O. 8, R. 6). But it is not an exception at all if we note that the statement in such cases is treated as a plaint and required to be stamped as a plaint. Even in such cases an equitable set off is allowed beyond time.

We may fairly well conclude in spite of the *obiter dictum* of Chandavarkar, J.. and the judgment of Madhavan Nair, J.. in *Mamillapalli Kotappa* v. *Pamidipati Raghavayya* (24) that the question of limitation does not arise where the prior mortgage is set up as a shield in defence.

Next we have seen that owing to the clumsy wording of S. 95 a conflict arose as to whether the section applied merely to cases where possession has been obtained by the subrogee. In deciding claims for contribution by co-mortgagors with

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24. (1926) 52 M L J 532.

41. (1920) M W N 338 (P C). 42. (1920) M W N 143.

44. (1918) M W N 41. 47. (1911) I L R 35 B 438.

48. (1920) 70 I C 212 at 216.

reference to simple mortgages, the High Court held that Ss. 82 and 100 are the sections properly applicable [vide *Bhagwan Das* v. *Har Dei* (49) and *Har Prasad* v. *Raghunandan Prasad* (16)]. The conflict has been fortunately set at rest by the interpretation of the Privy Council in *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (18). The use of the word 'charge' in the section is again unhappy. A literal interpretation of the section would seem to mean that the co-mortgagor acquires a charge on the date of payment and that the period of 12 years prescribed by Art. 132 commenced from the date of payment. The absence of any such wording 'shall acquire in respect of the property all the rights and powers of the mortgagee as such' also indicates that the period of limitation is different for both the sections. But the Courts have held that in spite of the use of the word 'charge' the co-mortgagor is also a subrogee for the purpose of limitation. In spite of the application of the reasoning of S. 74 by analogy, the conflict was not happily set at rest. Subrogation arises by redemption and the subrogee is himself entitled to be redeemed by the other co-mortgagor under S. 95. If the co-mortgagor who redeems the prior mortgagee is a subrogee and has the rights of the prior mortgagee as such, it would be anomalous to hold that Art. 148 of the Limitation Act is not applicable to redeem such a co-mortgagor. In fact, the decisions of the different High Courts are singularly divergent on this point. The Allahabad High Court in *Khiali Ram* v. *Taik Ram* (50) and *Surat Singh* v. *Umrao Singh* (51), and the Calcutta High Court in *Raj Kamini Debi* v. *Mukanda Lal Bandapadhya* (17) held that Art. 148 applied to such a case. The Calcutta High Court in *Purna Chandra Pal* v. *Barada Prosanna Bhattacharjya* (52), the Madras High Court in *Munia Goundan* v. *Ramasami Chetty* (53), the Patna High Court in *Ram Narain Rai* v. *Ram Deni Rai* (54), the Lahore High Court in *Wasir* v. *Girdhari* (55), the Bombay High Court in *Vasudev* v. *Balaji* (56) and subsequent cases have held that Art. 148 is not applicable as the co-mortgagor

16. (1908) I L R 31 A 166.
17. (1920) 57 I C 868. 18. (1905) L R 33 I A 81 : 16 M L J 269 (P C)
49. (1903) I L R 26 A 227.
50. (1916) I L R 38 A 540. 51. (1922) 20 A L J 611.
52. (1918) I L R 46 C 111. 53. (1918) I L R 41 M 650 : 34 M L J 528.
54. A I R 1923 Pat 98. 55. A I R 1923 Lah 311.
56. (1902) I L R 26 B 500.

by paying the prior mortgagee becomes only a charge-holder and Art. 144 is the proper article applicable. The conflict as already noted is mainly occasioned by the use of the word 'charge' in S. 95, Transfer of Property Act.

In conclusion it is suggested that the legislature should interfere and set at rest the conflict arising with regard to each of the questions above discussed at an early date so as to safeguard the interests of persons redeeming prior mortgages and claiming subrogation in respect of the same.

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SUMMARY OF ENGLISH CASES.

In re SIKES. MOXON *v.* CROSSLEY, (1927) 1 Ch. 364.

Will—Construction—Bequest of 'my piano'—Piano subsequently sold and new one purchased—New piano whether passes to legatee.

A testatrix provided by her will as follows:—"I bequeath my piano to *E* . . . " At the time she made her will she possessed a 'player' piano. Subsequently she sold the same and purchased a piano known as an electric motor player piano which she retained down to her death. The question arose whether the new piano passed to the legatee.

Held that when making the bequest of 'my piano' the testatrix referred to a particular thing and intended to give a particular piano then in her possession and no other, and that consequently the new piano did not pass to the legatee.

In re A DEBTOR, (1927) 1 Ch. 410.

Company—Liquidation—Managing Director obtaining judgment against company—Fraudulent preference—Liquidator's claim against Director—Set-off whether can be pleaded.

"If a creditor of a company receives payment of the sum due to him in such circumstances that the payment amounts to a fraudulent preference, the position is that he has no right to receive his debt in full, but has a right only to be paid a dividend on his debt *pari passu* with the other creditors: the decision of the Court, in a winding up subsequently supervening, that the payment to him was a fraudulent preference, must necessarily amount to a decision that he had no right to receive his debt in

full, but had a right only, in the circumstances, to claim *pari passu* with the other creditors".

Held, that the Managing Director of a company in liquidation was not entitled to set-off against the claim of the liquidator for the money which he had wrongly received in full, a claim to be paid under his judgment an equivalent amount as a debt.

In re ERRINGTON. GIBBS *v.* LASSAM, (1927) 1 Ch. 421.

Will—Construction—Bequest of residuary estate—Codicil —Provision as to who should take after legatee's decease—Substitutional gift—Mode of distribution.

A testator after reciting in his codicil that by his will his daughter *E* was entitled to one-third part of his residuary estate declared that she should be entitled only to the income of such estate and that after her decease the same should be divided between his daughters *J* and *S* or "if dead, between their issue, share and share alike". The testator died in 1888, *J* in 1925, and *E* one year thereafter. *J* left numerous children and grandchildren. The question arose how *E's* share was to be divided.

Held, that the codicil must be construed as if the testator provided that the property was to be divided between the two sisters, but that in the event of either being dead at the time of the distribution the issue of that one were to stand in her stead and take by way of substitutional gift; that only those of *J's* issue could be substituted who were living at her death or who were born after her during the lifetime of *E* and they would take in equal shares *per capita.*

In re *Hutchinson's Trusts,* (1882) 21 Ch. D. 811 applied.

In re CHARTRES. FARMAN *v.* BARRETT, (1927) 1 Ch. 466.

Will—Construction—Bequest to class—Class how to be determined—Rule of convenience.

A testator bequeathed his residuary estate to his trustees and directed that the income for twenty-one years from his decease should be paid to his daughter and his son *R.* By another clause it was provided that after the expiration of the said period a portion of the trust funds was to be taken by the child or children or remoter issue of *R* in such manner as *R* by his will might direct and that in default of appointment for all *R's* children 'who being sons attain the age of twenty-one

years or being daughters attain that age or marry'. The testator died on March 11, 1905 so that the twenty-one years period expired on March 11, 1926. *R* had an only son born in March 1895. In 1924 *R* released his power of appointment. In 1925 *A* died having by his will appointed *F* and *R* as his executors and bequeathed the estate to them upon trust with a direction that the income after paying the funeral and other expenses should be paid to *R*.

Held, applying the rule of convenience that the class is to be determined at the earliest possible time, that *A's* executors were entitled to the estate and that *R's* future children if any will not be entitled to participate in the fund.

SABATIER *v.* TRADING CO., (1927) 1 Ch. 495.

Company—Foreign company having office in England—Administrative activities carried on—Business activities nowhere carried on—Action against company—Service of writ on Managing Director—Validity—Entry in register—Effect—Companies (Consolidation) Act, 1908, S. 274.

Where a foreign company had an office in London at which certain administrative activities were being carried on and it appeared that there was no other place anywhere at which the company was carrying on trading activities and in an action against the company the writ was served on the Managing Director at the London Office.

Held, that the company must be held to be carrying on a business in England and that service of the writ on the Managing Director was proper service within the meaning of S. 274 of the Companies Act; that at any rate there was valid service because under the section if once a company had an established place of business in England it would be bound by the service, even if it ceased to carry on business, so long as the name of the nominee, the Managing Director in this case, remained on the register.

KEPPEL *v.* WHEELER, (1927) 1 K. B. 577 (C A).

Principal and Agent—Agent to sell property—Duty to disclose information to principal—Breach of duty—Damages—Bona fide mistake of agent—Commission when can be claimed.

When agents are employed to find a purchaser for a property their position as agents cannot definitely end at any time

short of the time when a definite binding contract is entered into and exchanged: if in the interval they receive information which tends to show that the value of the property is greater than had been supposed or is otherwise of a nature to influence materially the judgment of the principal in going on with the contract they are bound to communicate that information to their principal; if they do not do so they are guilty of a breach of their duty as agents and are consequently liable for damages. The amount of damages is the difference between the amount which the vendee gave and the amount which the person making the subsequent offer would have given if the agents had done their duty.

Held, on the facts that as the agents had acted in good faith and as the transaction was completed and the principal had the benefit of it they were entitled to claim their commission.

PUTSMAN *v.* TAYLOR, (1927) 1 K. B. 637.

Restraint of trade—Agreement of service—Promise not to carry on trade for five years—Validity—Doctrine of severability.

A contract of service provided that after the determination of the period of employment the employee should not for five years carry on any business similar to that of the employer or be employed by *D* or be employed in any capacity by any person, firm or company carrying on a business similar to that of the employee in places *A*, *B* or *C*.

Held, that the promise not to take service in place *A* for five years was not one in restraint of trade and that the same was enforceable as a distinct and severable contract.

Per Salter, J.—"The doctrine of severability is not confined to contracts of service, nor to contracts in restraint of trade. If a promisee claims the enforcement of a promise and the promise is a valid promise and supported by consideration the Court will enforce the promise notwithstanding the fact that the promisor had made other promises supported by the same consideration which are void and has included the valid and invalid promises in one document........ Whether the promise is a separate promise or not depends on the language of the document. We have to see whether the severance

alters the original meaning and effect of the agreement or only limits the sphere of its operations".

"The question whether a covenant in restraint of trade is unduly wide, though depending on questions of fact, is always treated as a matter of law. The limits in time and space, the nature and agreed duration of the employment, and all the circumstances must be considered together, the *onus* being on the employer to show that the covenant is not too wide".

[The decision was confirmed by the Court of Appeal on a construction of the entire covenant without regard to the doctrine of severability. *See* (1927) 1 K B 741.]

BEHUKE *v.* BEDE SHIPPING CO., (1927) 1 K B 649.

Sale of goods—'Goods' whether include ship—Contract for sale of ship—Specific performance—Sale of Goods Act, 1893, *Ss.* 52 *and* 62.

The expression "goods" is defined in S. 62 of the Sale of Goods Act, 1893, as including "all chattels personal other than things in action and money".

Held that a ship is a chattel personal and comes within the definition of goods and that specific performance could be granted of a contract for the sale of a ship.

LAGAN NAVIGATION CO. *v.* LAMBEG BLEACHING, DYEING AND FINISHING CO., (1927) A C 226.

Nuisance—Abatement of—Raising banks of canal to prevent flooding—Adjoining lands flooded—Act whether amounts to nuisance—Statutory powers—Principles regulating abatement of nuisances.

The plaintiffs the Lagan Navigation Company who were authorised by Statutes to keep a canal in good and substantial repair and in an efficient state for purposes of navigation raised the coping and embankment of one of their locks in order to prevent flood water coming down its reach. During a heavy flood in that part of the country the defendants who were owners of adjacent lands entered on the lock and cut channels right along the length of the lock on both sides so that the flood water might reach the lower reaches of the channel. In an action by the Lagan Navigation Company for an injunction and for damages:

Held, that the erection of the banks having been made under the statutory powers in order to secure the proper navigation of the lock, the plaintiffs were not guilty of creating a nuisance on their property; that assuming that the erection of the banks with the resultant flooding caused by them was a nuisance the defendants were not entitled without giving any notice of their intention to enter on the bank of the canal in the manner they did and cut drains on the lock.

Per Lord Atkinson :—"The abatement of a nuisance is a remedy which the law does not favour and is not usually advisable and its exercise destroys any right of action in respect of the nuisance .... The defendants have violated every principle touching the abatement of nuisances. They gave no notice of their intended action. They have not proved that they did not do any unnecessary damage. They have not proved that there was not an alternative method to reduce the flooding of their lands."

MORRIS *v.* HARRIS, (1927) A. C. 252.

Company—Order of Court avoiding dissolution—Effect on acts done during interval—Companies (Consolidation) Act, 1908, S. 223 (1).

S. 223, Sub-S. (1) of the Companies (Consolidation) Act, 1908 runs thus: "Where a company has been dissolved the Court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved".

Held by the majority of the House of Lords (Lord Shaw and Lord Wrenbury dissenting) that an order of the Court under the above section avoiding a dissolution do not affect the validity or the contrary of steps taken during the interval between the dissolution and its avoidance. They must still depend on the facts existing and the rights arising before and independently of that order.

Per Lord Blanesburgh :—"The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolu-

tion to have been void. Then, and only then, is the company restored to activity".

MARTIN *v.* LOWRY. MARTIN *v.* INLAND REVENUE COMMISSIONERS, (1927) A C 312.

Income-tax and Excess Profits Duty—Liability for—Carrying on trade—Single transaction on extensive scale whether amounts to—Meaning of expression 'annual profits or gains'—Income-tax Act, 1918, *Schedule D.*

A merchant who was not usually engaged in the purchase or sale of linen purchased a large quantity of linen with the sole intention of selling it again at a profit, and he proceeded to sell it piecemeal by an extensive series of transactions spread over a period of seven months using for the purpose an organization and methods such as are ordinarily adopted by traders in selling the articles in which they deal. By means of the said transactions he made a huge profit and the question arose whether the same was assessable to income-tax and excess profits duty.

Held, by the House of Lords affirming a decision of the Court of Appeal that the assessee was carrying on a trade, that the profits came within the description of "annual profits or gains" in the first paragraph under Schedule D to the Income-tax Act, 1918 and that the same was chargeable to income-tax and excess profits duty. The words 'annual profits' do not necessarily imply recurrence, they simply mean the profits or gains accruing in the year in question. *Ryall* v. *Hoare,* (1923) 2 K B 447 approved.

CORPORATION AGENCIES *v.* HOME BANK OF CANADA, (1927) A C 318.

Banker and Customer—Company—By-laws—Director fraudulently drawing cheques on himself—Bankers not having notice of fraud—Liability to account as trustees—Company not sustaining loss—Effect—Device of 'kiting'.

Where under the by-laws of a company the Director was authorised in conjunction with the Secretary-Treasurer to draw cheques on the company's banking account and the Director and Secretary-Treasurer signed a number of cheques in favour of the Director himself and it subsequently appeared that the cheques had been fraudulently drawn in order to assist the Director in his 'kiting' operations but at the same time it was shown

that moneys not belonging to the company were invested in the bank at the instance of the Director.

Held, in an action by the company against the bank to recover the money paid towards the cheques that the bank had not notice or knowledge of the fraudulent nature of the transactions and that consequently the bankers could not be made to account as trustees under the ruling in *John* v. *Dodwell & Co.*, (1918) A C 563. The decision was also supported on the ground that the company had sustained no loss; that neither the payments nor the drawings were authorised acts and the company could not repudiate the one and take the benefit of the other.

Per Lord Wrenbury.—"The device known in Canada as 'kiting' is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another and perhaps through many more. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid for which they are debited at the bank on which they are drawn."

DOUGHTY *v.* COMMISSIONER OF TAXES, (1927) A C 327.

Income-tax—Partnership converted into limited company—Transfer of business—Value of stock overestimated in company's balance-sheet—Increased value whether assessable to income-tax—Land and Income-tax Act, 1916, *of New Zealand.*

Where two partners converted their partnership into a private limited company of which they were the only two shareholders and all the property of the business was consequently transferred to the company and the value of the stock was entered at a higher figure in the company's balance-sheet and the partner was assessed to income-tax on the increased value

Held, on the facts that there was no sale at all but a mere readjustment of the business position of the two partners and that the company's book-entry containing an overestimated value of the stock did not render it chargeable to income-tax; that assuming that the transaction was to be treated as a sale, there was no separate sale of the stock, and no valuation of the stock as an item forming part of the aggregate which was sold and consequently there was no liability to income-tax.

BRITISH AMERICA NICKEL CORPORATION, LTD. v. M. J. O'BRIEN, (1927) A C 369.

Company—Deed of trust—Mortgage bonds—Resolution converting mortgage bonds into income-bonds—Purchase of vote—Validity of resolution—Scheme vesting control in Committee—Whether ultra vires.

A company executed a mortgage deed of trust and raised money by issuing secured bonds. The trust deed provided power to a majority of the bond-holders consisting of not less than three-fourths in value to sanction a reconstruction of the company, to enter into a scheme for selling its assets and to sanction any modification of the rights of the bond-holders. A scheme for reconstruction was prepared on behalf of the company with the object of compelling the holders of mortgage bonds to exchange them for new income bonds and a committee was also constituted with full powers to modify the security of the mortgage-holders. The vote of one *B* was necessary in order to gain the required majority of bond-holders for passing the scheme and it was secured by a promise to him of a large sum of money.

Held that the resolution authorising the scheme was invalid because *B's* vote had been purchased ignoring the interests of the class of bond-holders and that the appointment of the committee was *ultra vires.*

Per Viscount Haldane :—"There is no difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity as being a member".

THE CROWN *v.* MCNEIL, (1927) A C 380.

Interest—Mining contract as between Crown and subject —Breach—Suit for balance of money—Interest whether can be awarded.

The owners of certain mines delivered their ores to the West Australian Government for treatment and sale and on the terms that the balance of the sums realised by the sale of the products should be applied to discharge the sums due to the owners of the mines as sellers and there was great delay in mak-

ing payment of the sums to the owners on the agreed terms and they sued for the balance and for interest.

Held that as regards the ultimate balance it was held by the Crown in a fiduciary capacity and that liability for interest was one of the incidents of such a fiduciary capacity.

Per Viscount Finlay :—"If a person who has received money in a fiduciary capacity unduly delays making payment to his beneficiary, he is accountable in equity for interest upon the amount of the principal".

THE VALESIA, (1927) P. 115.

Shipping—Salvage—Contract for beaching ship—Non-performance—Negligence of shipowner—Damages.

Where the owners of certain tugs agreed in return for a lump sum to assist a ship which had grounded on the rocks in getting it on to a sandy bay and the contract was not performed because of the negligence of the shipowner through his agents in not slipping the cable at the proper time.

Held, that the owners of tugs were not entitled to recover the sum they stipulated for but that they were entitled to claim damages for breach of the shipowner's obligations; also that judgment should only be given *in personam* against the shipowner.

JOTTINGS AND CUTTINGS.

Identity and Finger Prints.—An extraordinary problem of identity has recently arisen to baffle the Italian police in the case of *Bruniera, alias Canella* (*Times,* March 15). In 1917 Professor Canella of Milan, while serving with the Army in Macedonia, was reported missing and was never heard of again. In 1924 a man suffering from loss of memory was admitted into a Piedmont Asylum and there he remained for two years. Last year the wife and family of the Professor hearing that the asylum inmate bore remarkable external resemblance to their lost husband and father, visited the asylum, and unhesitatingly identified him as the professor. He was taken to Milan, where all the Professor's friends at once recognised him. By degrees he appeared to recover his memory, and then asserted that he was, indeed, the lost Professor, and purported to recall many incidents which had happened in the latter's career. All seemed well. Suddenly there fell a bolt from the

blue. A woman appeared on the scene and identified him as her husband, Bruniera, who had absconded three years before after a career of crime. The family and acquaintances of Bruniera one and all likewise identified him. He was examined and found to possess certain marks on the body which, however, curiously enough, were alleged by both parties of relations to be life-long marks of Canella and Bruniera respectively. The Italian police have produced the finger prints of Bruniera which are alleged to be identical with those of the man whose identity is in dispute; but although this evidence is regarded as conclusive by the police, it is not considered equally satisfactory by the Professor's family, who cling to their identification! Is it not just possible that, where two men bear such striking external points of resemblance, their finger-prints—produced by the same vital forces which have produced their bodily resemblances—may also be so similar as to be indistinguishable? After all, the belief that no two persons can have identical finger-prints is merely a matter of theory, based on probabilities and experience; it is not a matter which can be scientifically demonstrated.

—*The Law Journal,* April 16, 1927, p. 383.

Judicial Obiter Dicta.—Moved, no doubt, by a specific example, the *Drapers' Record* calls attention to "the pain and indignation caused by the irrelevant comments of some Judges, and particularly some of the County Judges" during the trial of cases which come before them. "It ought not to be necessary to remind a Judge of the impropriety of expressing opinions based upon *ex parte* statements, yet it is by no means uncommon for the Judge to utter more or less scathing remarks on the spur of the moment . . . . Parties coming before the Judge ought not to be regarded as targets for judicial humour or rudeness". Thus the *Drapers' Record.* It must be admitted that some Judges sometimes give occasion for such criticism. Witnesses, solicitors and counsel are made a butt for the rude jest and shrewd and often unwarranted rebuke; and it is every way desirable that such *obiter dicta* should be voluntarily suppressed.

—*The Law Journal,* April 16, 1927, p. 395.

The Improving Lawyer.—It is accepted in every age as a fact that counsel and Judges are much better than their predecessors, more polite and more humane. So Sir A. Macdonald

observed to Dr. Johnson: "Barristers are not so abusive now as they were formerly"; he opined that they "had less law long ago and so were obliged to take to abuse to fill up the time". That was round about the time of Jeremy Bentham.

Yet, according to twentieth-century standards, there was still plenty of room for improvement. According to Blake Odgers, Q. C., in a lecture to Bar Students in 1900, judges in Bentham's days browbeat prisoners, jeered at their efforts to defend themselves, and censured juries who honestly did their duties. Counsel bullied witnesses and perverted what they said. "The moral tone of the Bar is now wholly different from what it was when Bentham wrote; they no longer seek to obtain a temporary victory by unfair means . .....This is due partly to the improved education of the Bar; partly to the influence of an omnipresent Press; still more to Her Majesty's Judges. If Counsel for the prosecution presses the case too vehemently against the prisoner; if counsel in a civil case pries unnecessarily into the private concerns of the witness; a word, or even a look from the Judge will at once check such indiscretion. Remember the students of the four Inns....." Such was the state of pre-war excellence; and progress has, apparently, been maintained.

—*The Law Journal,* April 16, 1927, p. 395.

The Crown as Litigant.—The Committee on Crown Proceedings were somewhat hampered in their endeavours by the intervention of Lord Haldane in 1924, who modified the original terms of reference and asked the Committee to prepare a Bill "on the assumption" that the suggested alterations of the law were in fact both desirable and feasible, and the Committee accordingly express no opinion on the merits of the proposals. The draft Bill, however, involves changes of great theoretical and some practical importance. Part I provides that litigation between Crown and subject in the High Court will be conducted in the same way as litigation between subjects; that actions by or against the Crown may be brought in the County Courts; while the Court may grant any relief to or against the Crown. Part II enables proceedings to be brought against the Crown for tort; and Part III *inter alia* provides that in all cases of litigation between Crown and subject the same rules as to costs shall apply as in ordinary litigation; while discovery to some extent may be obtained against the Crown.

So will pass, if and when a Bill embodying these provisions becomes law, the Petition of Right, Procedure by Information, and the theory that the King can do no wrong. Immunity from proceedings for tort has hitherto been shared by the King and the Trades Unions; but thereafter the Trade Union will, by virtue of 6 Ed. VII, Ch. 47, S. 4 (1), unless meanwhile something be done about it, continue to enjoy this Olympian freedom alone.

—*The Law Journal*, April 23, 1927, p. 415.

The Scottish Model.—How far our theory in proceedings by and against the Crown lags behind that of the customs has been pointed out by Professor Morgan in his recent pamphlet on "Remedies Against the Crown"; but it was left for Lord Dunedin, writing to the *Times* from his holiday retreat at Bath, to point out that this trouble about Crown procedure was satisfactorily solved in Scotland nearly a century ago. "We never," says Lord Dunedin, "had occasion to have any such thing as a Petition of Right". Since the forties of last century the Lord Advocate represents the Crown for all purposes of defence. A "diligence"—the Scottish equivalent to discovery, is granted just as readily against the Crown as against a subject. If the Crown claims privilege for a particular document on grounds of public policy, the Judge himself would examine it; "for Judges, except when they wish to make jokes, can be trusted to keep their mouths shut."

It is certainly curious that Professor Morgan and others who ought to have known better overlooked the Scottish model. According to Lord Dunedin, the fundamental difference between the Common Law of England and that of Scotland is "that in England you have to find the remedy in order to discover the right, whereas in Scotland you have to find the right in order to discover the remedy."

—*The Law Journal*, April 23, 1927, p. 415.

Clearing the Court.—The power of Judges to exclude the public from Court when it seems desirable so to do has often been debated. The rule appears to be that there is no right to hear the case "in camera" unless it has to do with lunatics or wards of Court, or is of the kind to which the old practice of the Ecclesiastical Court applies, or is one the object of which would be defeated by a public trial. It is clear that the public are

entitled to be present at all criminal trials, and the conventional direction that women and children shall leave the Court has, as regards the former, no legal sanction. Many Judges take pains to make this clear, and the ladies concerned not infrequently avail themselves of their rights.

—*The Law Journal*, April 23, 1927, p. 416.

BOOK REVIEWS.

THE LAW OF INCOME-TAX IN INDIA, by Mr. V. S. Sundaram of the Indian Audit and Accounts Service, Secretary, Central Board of Revenue, Government of India. 1927. Published by Messrs. Butterworth & Co. (India), Ltd. Price Rs. 12.

We have already had more than one commentary on the Income-Tax Act from practising lawyers and, having regard to the nature of the subject, an exposition thereof by one who has been in close touch with it on the administrative side is certainly welcome. We may observe at the very outset that in the volume before us the treatment of what may be called the legal aspect of the subject is not any the less full or instructive because the author does not happen to be a lawyer by profession. The commentaries on the definition clauses and the principal 'charging' sections alone cover more than 400 pages, marked by a thorough and discriminating analysis of the case-law both in India and in England and freely interspersed with instructive references to the law in the Colonies and in the United States of America. This comparative treatment is indeed characteristic of the book and added to the historical information given in the Introduction and the Appendices, it greatly enhances the value and utility of the work. The elucidation of the points of difference between the law and practice in India and those obtaining elsewhere is clear and precise. We may, for instance, refer to the discussion at pages 147, etc., of the theory that the source of income must have existed during the year of assessment and at pages 225, etc., of the different connotations placed in different countries on the conception of the 'accrual' of income in a particular place or during a particular period. The author has not hesitated to criticise judicial pronouncements where he thought such criticism necessary or justified. Being intended not merely for use in Courts of law but also for the guidance of Income-tax Officers and a large section of the public, the book rightly deals at some length with

matters which in a Court of law may either be taken to be familiar or be regarded as beyond its province. The author was therefore also well advised in setting out the facts of all important decisions pretty fully and quoting freely and at length from all relevant judgments. Indian case-law on the subject is yet in the making and it is well that English precedents are fully understood before the authorities here decide whether and how far they are to be followed in this country. On points not covered by authority, the views expounded in the book may (notwithstanding the words of caution uttered in the Preface) be fairly taken as likely to be acceptable to the officers who have to work the Act and not unnaturally the author looks at certain matters more from the point of view of the department or the assessing officer than from that of the assessee. See, for instance, his observations at pages 258 to 260 as to the onus of proof in case of remittances from abroad and at pages 575, etc., with reference to the principles of evidence and procedure that should be followed by the Income-tax Authorities.

It is certainly convenient to have the text of the Act and the rules under it printed together in one place without having to search for them through the commentaries and the addition thereby caused to the bulk of the volume is not very much. Some of the material provisions of the English Income-tax Acts are set out here and there in appropriate places but we venture to think it may be more convenient to have them also brought together and printed as one of the Appendices. We have no doubt that the book will long remain the leading Indian Treatise on Income-tax Law.

THE HANDBOOK OF INDIAN COMPANY LAW, by Solomon Judah, B.A., LL. B. Published by Messrs. Butterworth & Co., Ltd., Calcutta. Price Rs. 12.

This work is a commentary on the Indian Companies Act giving annotations thereon and notes explanatory of the practical operation of the company system. In this work the author has stated in a clear and concise form the principles of Indian Company Law under the various provisions of the Act and he has referred to the judicial decisions in England and this country. The lucidity of the commentary will make it useful not only to lawyers and students of law as a handbook on this important branch of law but also generally to businessmen. In some respects the Indian Companies Act of 1913 marks an

important departure in the history of Indian Company Law and contains several provisions as, for instance, in relation to the private limited company which in its present form was first brought into existence by this Act. With a view to illustrate the usefulness of the work we would refer to the various appendices to the work giving the Indian Companies Rules of 1914, the list of offences under the Act, the table of corresponding sections of the English Companies Act and the practical hints for the formation of a company limited by shares. We have no doubt that the book will be found useful not only to lawyers but to laymen connected with business.

A MANUAL OF COMPANY LAW, by Pahlajsing B. Advani, M.A., LL.B. Price Rs. 3.

This book of less than 200 pages does not take the form of commentary of the Indian Companies Act under its various provisions. On the other hand, it is an attempt by the author to state the principles of the Company law as collected from the Act in their natural and logical sequence with references to the sections of the Act in the marginal notes. There is not always a natural or logical sequence in the provisions of the Indian Companies Act and many of the sections are long and involved with the marginal notes conveying an inadequate and not very illuminating idea of the entire contents of the sections. Under these conditions a book which merely sets out the principles of the law has to be welcomed One remarkable feature of the book may be drawn attention to here and that is the deliberate avoidance of the references to rulings, Indian or English, while their substance has been incorporated. It is well known that references to and quotations from rulings oftentimes perplex the student and more so the businessman. We have no doubt that the book will be found very useful to students and also to the promoters, managers and liquidators of companies for whom it is mainly intended.

THE MOTOR VEHICLES ACT, by Nripendra Nath Dhar, B. L., Vakil, High Court, Calcutta. Published by M.C. Sarkar & Sons, Calcutta. Price Rs. 2-8-0.

Anybody attending the Police Courts or reading the daily newspapers must be impressed by the numerous accidents on the road owing to the motor vehicular traffic. The appearance of this work, which though primarily intended as a book of reference for Judges and lawyers has been so arranged as to meet the

requirements of the owners, drivers, manufacturers and dealers of motor vehicles, satisfies a greatly felt want. The Act itself with its 19 sections has been given with full commentaries under its provisions. The more important feature is the appendices giving the Motor Vehicles International Circulation Rules of 1915, the Motor Vehicles (Native States) Rules of 1916 and the Motor Vehicles Rules of the various Local Governments of Bengal, Madras, the United Provinces and Bombay. Perhaps the most interesting portion of the book is the bird's eye-view of the law of motor vehicles in India deduced from the Act and supported by the decisions found at the opening of the volume. This summary has been written with great clearness so as to be useful to the layman.

THE LEGAL PRACTITIONERS ACT, Second Edition, 1927, by Kshitish Chandra Chakravarti, M. A., B. L., Advocate, High Court, Calcutta. Published by M. C. Sarkar & Sons, Calcutta. Price Rs. 3-8-0.

Since the publication of the first edition several important legislative changes on the subject have taken place which have to be noticed in any up to date book on the subject. Those changes have been noticed and fully discussed in the present work. The reported decisions have been brought up to date. We may perhaps notice that after the decision of the Privy Council in *Shankar Ganesh Dabir* v. *Secretary of State for India* (1) which has laid down that S. 13 (*f*) of the Legal Practitioners Act is not merely confined to acts done in a professional capacity by a legal practitioner, it is no longer open to argument that clause (*f*) of the section must be read *ejusdem generis* with the other clauses of the section. Although this decision is referred to under S. 12 of the Act, the learned author has not referred to it under S. 13 (*f*) on which it has a direct bearing and renders the discussion at page 60 of the book about the *ejusdem generis* rule and the references to older cases, more or less academic. The various appendices giving the rules in the various provinces relating to legal practitioners and their admission to practice in the courts greatly add to the usefulness of the book. Towards the end, the Bombay Pleaders Act of 1920 is given as an appendix. With such useful information, the book we hope will be found valuable to those having to deal with the subject.

1. (1922) I L R 49 C 845 : 44 M L J 32 (P C).

KHAN'S CIVIL AND CRIMINAL LAW SERIES. ARMS AND EXPLOSIVES, Vols I and II, Second Edition, 1927. Price Rs. 5.

This is an annotated edition of the Indian Arms Act, 1878 and the Indian Explosives Act of 1884 with the rules framed thereunder. The plan of the work is that under each section of the Act notes and comments including the case-law bearing thereon are set out. Then we find a note on legislation and, lastly, the rules and orders under each section commencing with those of the Government of India and dealing afterwards province by province. The author is entitled to the gratitude of the profession for having collected together all the various rules and orders scattered over different manuals in the several provinces which are often not easy to get. That the book has been practically re-written in this edition will be evident from the fact that the Arms Act portion which in the first edition covered only 80 pages now occupies no less than 350 pages of condensed matter. The appendices give valuable information upon all connected and kindred topics, such as provisions relating to licensed dealers, the provisions relating to Indian States and the army regulations and provisions relating to military men. Volume II deals with the Arms Rules of 1924 with the same arrangement as noticed above.

THE INDIAN LAW OF HEARSAY EVIDENCE, by Syed Anees Yusoof of the Middle Temple, Bar-at-Law. Published by the Union Press, Meerut. Price Rs. 6.

The volume under review treats of a special branch of the Law of Evidence which has not been separately dealt with before, though the law bearing upon the same may be found in various places in any well-ordered text-book in the Law of Evidence. The most attractive and interesting portions are the opening chapters dealing with the historical development of the rule against hearsay, the objections to the hearsay evidence, the exposition of what is hearsay and a consideration of its various definitions, the meaning of the rule, its relaxation and exceptions. The principles being thus considered in the first two chapters, the author then deals with the subject under the various sections of the Evidence Act. We feel confident that this book treading, as it were, a new ground will be found interesting and instructive.

TRIAL OF H. R. ARMSTRONG. Edited by Filson Young. Notable British Trials Series. Published by Messrs. Butterworth & Co., Ltd., Calcutta. Price Rs. 6-8-0.

The volume under review deals with a very recent case of arsenic poisoning of a wife by her husband brought to light under strange circumstances nine or ten months after the death. The trial of the accused was sensational, as usual, and was the last of the murder cases tried by one of the greatest Cri. Judges of recent times, Mr. Justice Darling, as he then was. The importance of the trial may be gauged from the fact that the prosecution was conducted by the Attorney-General himself (Sir Ernest Pollock, now Lord Hanworth, M. R.) while the defence was in the hands of no less a lawyer than Sir Henry Curtis Bennet, K. C. The very mention of these names is sufficient for the reader to judge for himself what he can expect in the volume in the matter of examination of witnesses, addresses to the Jury and the summing up of the Judge.

It is not possible, within the space allotted for a review, to give even the bare details of the strange story that was unfolded at the trial day after day, culminating in the death of Mrs. Armstrong, how eminent doctors who attended on her during the many months of her illness never suspected arsenic poisoning and how suspicion of the true cause of her death was first raised by a subsequent attempted poisoning of a fellow-solicitor named Martin by the accused Armstrong. We must leave our readers to the pages of the volume itself. Very great interest will be felt by the lawyer in the question how far evidence was admissible in a trial for the murder of Mrs. Armstrong of the facts relating to the subsequent attempt to poison Martin. Mr. Justice Darling, without giving reasons, held the evidence admissible. Appendix A to the volume contains the full arguments on the question when the matter was taken up before the Court of Criminal Appeal and also the judgment of that tribunal holding the evidence admissible. Apart from the interest of the story, this by itself will amply repay a perusal of the volume and justify the observations of Mr. Justice Darling in his summing up that "the case is deeply interesting and one of very great importance to the public."

It is really unnecessary on our part at this point of time to refer to the well-known features of the Notable Trials Series which are maintained in this, the latest of the volumes issued by Messrs. Butterworth and Co.